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December 2, 2003

**VIA HAND DELIVERY**

Walter Thomas, Secretary  
Alabama Public Service Commission  
P. O. Box 304260  
Montgomery, AL 36130-4260

DEC 2003  
RECEIVED  
ALA PSC  
LEGAL DIV.

**IN RE: Petition for Declaratory Relief Regarding Classification of Phone-to-Phone IP Telephony Service, Docket No.: 29016**

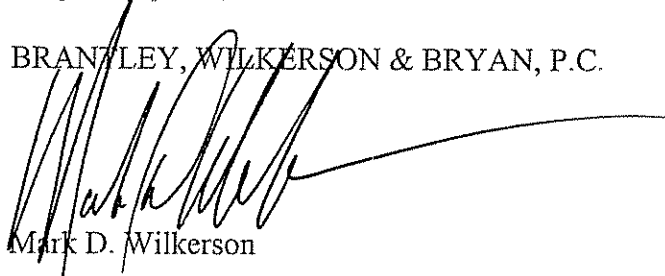
Dear Mr. Thomas:

Enclosed herein for filing with the Alabama Public Service Commission are the original and ten copies of the Reply Comments to be filed on behalf of the Local Rural Exchange Carriers listed in Appendix "A".

If you have any questions, please do not hesitate to contact me.

Very truly yours,

BRANTLEY, WILKERSON & BRYAN, P.C.

  
Mark D. Wilkerson

MDW:cld

Enclosure

**BEFORE THE ALABAMA  
PUBLIC SERVICE COMMISSION**

<b>PETITION FOR DECLARATORY</b>	)	
<b>RELIEF REGARDING</b>	)	
<b>CLASSIFICATION OF PHONE-TO-</b>	)	<b>Docket No. 29016</b>
<b>PHONE IP TELEPHONY SERVICE</b>	)	
	)	

**REPLY COMMENTS OF PETITIONING ILECS**

The Local Exchange Carriers listed in Exhibit "A" to the above-styled Petition for Declaratory Relief (the "ILECs"), submit the following reply comments.

**I. Summary of Comments.**

In addition to the Petitioning ILECs, four parties filed comments in this proceeding: (1) the Alabama Attorney General ("Attorney General"); (2) The Alabama Cable Telecommunications Association ("ACTA"); (3) MCI WORLDCOM Communications, Inc. ("Worldcom"); and (4) BellSouth Telecommunications, Inc. ("BellSouth").

BellSouth urges the Commission to declare that phone-to-phone IP Telephony, particularly the type of service now being provided by AT&T, is subject to APSC jurisdiction, and to affirm that such traffic is subject to the same access charge regime as other interexchange telephone calls. BellSouth also takes the position that "to the extent that VoIP is used to complete a voice call that uses a local exchange carrier's network in either origination or termination, then the local exchange carrier should be entitled to compensation for the use of its network." (BellSouth, pp. 5-6.) BellSouth urges the Commission to delay further action on other types of IP Telephony pending the outcome of various FCC proceedings. (BellSouth, p. 7.)

ACTA heralds IP Telephony as providing "the potential for real facilities-based competition for local residential and small business services." (ACTA, p. 4.) In the same

breath, it argues that IP Telephony Providers should be given favored treatment, including a “general presumption” against any form of APSC regulation and the payment of access charges for use of the public switched telephone network. (ACTA, pp. 6, 11.) Worldcom, while conceding that there is a need to “eliminate artificial distinctions among different types of traffic” (Worldcom, p. 11), also seeks special treatment, urging the Commission to do nothing and simply “monitor” the situation. The Attorney General timidly states that the APSC’s review “may be premature” and urges a delay until the technical and legal issues are more developed. (Attorney General, p. 2.)

As discussed in detail below, Alabama law does not allow the type of “general presumption” urged by ACTA, nor the self-serving “wait and see” approach pushed by Worldcom. The ILECs have a right to be compensated for the use of their networks to originate and terminate voice calls. Additionally, this Commission cannot turn a blind eye to providers of IP Telephony service while continuing to assert regulatory jurisdiction over other carriers using indistinguishable technologies. Such disparate treatment is not only inequitable, but will endanger the public welfare and safety.

## **II. Alabama Law Does Not Permit the Selective Enforcement of the APSC’s Jurisdictional Statutes.**

ALA. CODE § 37-2-3 (1975) provides the Commission with sweeping, jurisdiction over all carriers that meet the definition of a “transportation company”:

The Public Service Commission is charged with the duty of supervising, regulating and controlling all transportation companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies, and the commission shall . . . prescribe and enforce against said transportation companies, in the manner authorized in this title, such rates, charges, classifications . . . rules and regulations . . . All rates, charges, classifications, rules and regulations adopted or acted upon by any transportation company inconsistent with those

prescribed by the commission acting within the scope of its authority, or inconsistent with those prescribed by any statute, shall be unlawful and void . . .

While ALA. CODE § 37-1-80 (1975) provides the Commission with authority to utilize alternative methods of regulation, the law does not allow the APSC to refuse to regulate or apply Alabama's utility laws to carriers that fall under its jurisdiction. To the contrary, Alabama courts have made it clear that when regulatory jurisdiction exists over a form of intrastate communications, it is broad and exclusive. *South Cent. Bell Tel. Co. v. Holmes*, 689 So. 2d 786, 789 (Ala. 1996); *Talton Telecommunication Corp. v. Coleman*, 665 So. 2d 914 (Ala. 1995); *Taffet v. Southern Co.*, 967 F.2d 1483 (11<sup>th</sup> Cir. 1992), *cert. denied*, 506 U.S. 1021 (1992); *QCC, Inc. v. Hall*, 757 So. 2d 1115 (Ala. 2000).

### **III. IP Telephony Providers That Offer Alabama Subscribers the Ability to Complete Intrastate Telephone Calls Are Transportation Companies Under Alabama Law.**

Neither this Commission nor Alabama Courts have restricted the application of ALA. CODE § 37-1-30 (1975) to what ACTA describes as “traditional ‘telephone lines’.” (ACTA, p. 6.) Since enactment of the statute, “telephone lines” have evolved from copper strands connected to manual cord boards to fiber optic strands transmitting bursts of light. Throughout this period, the term “telephone line” has consistently been interpreted by the Commission and the courts to incorporate any medium used to carry telephonic communications. This principle was most recently affirmed by the Circuit Court of Baldwin County, Alabama in a case involving Worldcom and other telecommunications providers. *Driver v. MCI Worldcom Communications, Inc.*, CV-2001-694, (Cir. Ct. Baldwin County, AL 2002). (Attached as Appendix “A”.) In *Driver*, the Court was required to interpret ALA. CODE § 23-1-85 (1975) which provides that “any person or corporation having the right to construct electric transmission, telegraph or telephone lines within this state to construct them along the margin of . . . public highways...”

(emphasis added). On summary judgment, the Circuit Court found that the term “telephone line” encompassed fiber optic facilities.

The Commission has also consistently interpreted ALA. CODE § 37-2-1 (1975) as applying to parties that provide service over facilities obtained from others. Indeed, the Commission regulates over fifty local and long distance resellers who fit this description.

#### **IV. The Petitioners Do Not Seek to Have the APSC Regulate Purely Interstate Communications.**

ACTA states that “VoIP has primarily been used to supplement traditional circuit-switched telephony in interstate and international communications--service that clearly fall outside of the APSC’s jurisdiction” and that intrastate VoIP applications have been “a very small part of the VoIP picture.” (ACTA, pp. 6, 7.) The ILECs concede that ALA. CODE § 37-1-30 (1975) exempts carriers that “are solely engaged in interstate commerce” from the APSC’s jurisdiction. However, the ILECs would challenge ACTA and Worldcom to find a single IP Telephony Provider that does not offer its subscribers the ability to make telephone calls between two points in the same state.

While IP Telephony providers may argue before regulators that they are not offering local telephone service, they are saying the direct opposite to consumers. This inconsistency was best characterized last week by the National Association of State Utility Consumer Advocates when it said “despite [IP Telephony Provider] Vonage’s assertions that what walks like a duck, quacks like a duck and has feathers like a duck is nonetheless not a duck, Vonage advertises its service as a duck.” *Reply Comments of the National Association Of State Utility Consumer Advocates, In the Matter of Vonage Holdings Corporation*, WC Docket No. 03-211 (FCC Nov. 24, 2003). A review of the advertisements of other IP Telephony providers confirms this characterization. See *VoicePulse Broadband Phone Service*, at <http://www.voicepulse.com>

(accessed Dec. 1, 2003). (No need for ... computer! Just pick up a normal touch-tone phone, dial a phone number and start talking!)

#### **V. The FCC Has Not Preempted State Regulation of IP Telephony Service.**

As noted in the ILECs' initial comments, the FCC has previously determined that "phone-to-phone" IP Telephony bears characteristics of a telecommunications service for purposes of the Telecommunications Act. (Rural LECs, p.4.) While the FCC is continuing to review how various forms IP Telephony should be treated under the Telecommunications Act, it has issued no order preempting state regulatory commissions from regulating intrastate IP Telephony service. Indeed, the National Association of Regulatory Utility Commissioners ("NARUC") is on record as opposing a pending Vonage petition seeking such a preemption order, in part because it does not take into account state law concerns. *Reply Comments of the National Association Of Regulatory Utility Commissioners*, WC Docket No. 03-211 (FCC Nov. 24, 2003).<sup>1</sup>

As ACTA notes, a federal judge in Minnesota recently ruled that Vonage's IP Telephony service was beyond the regulatory jurisdiction of the Minnesota Public Service Commission because it was an information service under FCC rules. *Vonage Holdings Corp. v. Minnesota Public Utilities Com'n.*, 2003 WL 22567645 (D. Minn. Oct. 16, 2003). The *Vonage* decision was wrongly decided and is but the first step in a long appeal process. The decision should also be contrasted with an October 6, 2003, Ninth Circuit Court of Appeals ruling which held that cable broadband internet service was not a "cable service" but rather was part

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<sup>1</sup> Additionally, in February of 2003, NARUC passed a resolution that notes "a significant portion of the nation's total voice traffic could be transported on IP networks within a few years" and urges the FCC to "confirm its tentative decision that certain phone-to-phone calls over IP networks are telecommunications services."

“telecommunications service” and part “information service.” *Brand X Internet Services v. F.C.C.*, 345 F.3d 1120 (9th Cir. 2003).<sup>2 3</sup>

Given the speed upon which IP Telephony is entering the marketplace, the APSC does not have the luxury of adopting a “wait and see” approach while the FCC and state regulatory commissions and courts hash out the issue. There is no way to accurately predict how, or when, the FCC may act on the pending petitions addressing VoIP services, much less the length of time it will take any such decision to become final. The existence of proceedings in other jurisdictions should not prevent the APSC from enforcing its own statutes in a fair and equitable manner.

#### **VI. Regulation is Necessary to Protect the Public Interest and Safety.**

A review of the Terms of Service of the leading IP Telephony Provider, Vonage, demonstrates why a “hands off” approach is inadequate to protect the public. Vonage’s lengthy Terms of Service, have been accurately described as “a lawyer’s dream and a consumer’s nightmare.”<sup>4</sup> For example, Vonage subscribers have only 7 days to raise a dispute (in writing) in contradiction to APSC Rule T-5. Vonage retains the right to discontinue dial tone service at any time for any reason in contradiction to APSC Rule T-7. Vonage does not acknowledge the right of a customer to call the APSC with a billing dispute, rather its customer disputes are subject to mandatory arbitration, with the claimant required to pay an up front deposit of \$125 to

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<sup>2</sup> In *Brand X*, the Petitioners had sought review of Federal Communications Commission’s (FCC) declaratory ruling, 17 F.C.C.R. 4798 (2002), that cable broadband internet service was not “cable service,” but was in part “telecommunications service” within the meaning of Telecom Act.

<sup>3</sup> On September 4, 2003, the United States District Court for the Western District of Washington referred litigation regarding the status of IP Telephony providers to the Washington Public Utilities and Transportation Commission for initial review. In its decision, the Court recognized that the issue was uniquely suited for resolution by the regulatory agency. *Washington Exchange Carrier Association, et al. v. LOCALDIAL Corp.*, CV-03-5012 (U.S. Dist Ct., W. Dis. Wa. Sept. 4, 2003). The Washington Commission has not yet issued a ruling.

<sup>4</sup> Comments Of The Frontier and Citizens Telephone Companies, WC Docket No. 03-211 (FCC Oct. 27, 2003).

have his or her claim considered.<sup>5</sup> If an Alabama subscriber wants to go to court, he must travel 800 miles to New Jersey.<sup>6</sup>

Most significantly, buried in the middle of Vonage's Terms of Service is the following disclaimer regarding the availability of emergency service:

You acknowledge and understand that 911 dialing from your Vonage equipment will be routed to the general telephone number for the local emergency service provider, and will not be routed to the 911 dispatcher(s) who are specifically designated to receive incoming 911 calls at such local provider's facilities when such calls are routed using traditional 911 dialing.

Because Vonage does not use the 911 network, it does not provide Automatic Location Information (ALI) to the Public Safety Answering Point (PSAP) to various Emergency Districts in Alabama. This means that a caller using the Vonage network to dial 911 will not be answered by an emergency specialist who is armed with information regarding the location of the call and is able to rapidly dispatch emergency personnel.

This Commission should not "wait and see" or "monitor" the situation until there is a death or serious injury because an IP Telephony subscriber is unable to obtain emergency service. Instead, it should assert jurisdiction and work to ensure that IP Telephony providers are appropriately integrated into Alabama's E-911 network and are required to collect and remit E-911 fees.

## **VII. Conclusion.**

At a minimum, the Commission should declare that an IP Telephony provider that uses an Alabama local exchange carrier's network to originate or terminate a voice call that is both originated and terminated within Alabama is subject to the same access charge tariffs as all other

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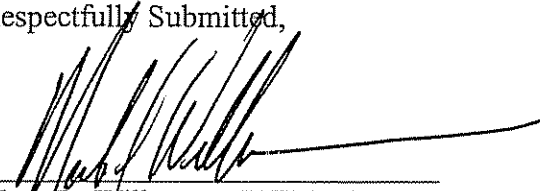
<sup>5</sup> AAA Commercial Arbitration Rules, Supplementary Procedures for Consumer Related Disputes, § C-8 (available at <http://www.adr.org> )

<sup>6</sup> Vonage Terms of Service, § 6.2



interexchange carriers. Additionally, the Commission should also declare that all providers of IP Telephony, including, but not limited to, providers of "phone-to-phone" service, are Transportation Companies under Alabama law and subject to the Commission's jurisdiction.

Respectfully Submitted,



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Mark D. Wilkerson (WIL072)

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CERTIFICATE OF SERVICE

I hereby certify that I have serviced a copy of the foregoing upon the following individual(s) in this cause by placing the same in the U.S. Mail, postage prepaid and properly addressed this 2 day of December, 2003.

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OF COUNSEL

## EXHIBIT "A"

ALLTEL Alabama, Inc.  
Ardmore Telephone Company, Inc.  
Blountsville Telephone Company  
Butler Telephone Company, Inc.  
Brindlee Mountain Telephone Company  
Castleberry Telephone Company, Inc.  
CenturyTel of Alabama, LLC  
Farmers Telephone Cooperative, Inc.  
Floral Telecommunications  
Frontier Communications of Alabama  
Frontier Communications of Lamar County  
Frontier Communications of the South, Inc.  
Graceba Total Communications, Inc.  
Gulf Telephone Company  
Hayneville Telephone Company, Inc.  
Hopper Telecommunications Co., Inc.  
Interstate Telephone Company  
Millry Telephone Company, Inc.  
Mon-Cre Telephone Cooperative, Inc.  
Moundville Telephone Company, Inc.  
National Telephone of Alabama, Inc.  
New Hope Telephone Cooperative, Inc.  
Oakman Telephone Company, Inc.  
Otelco Telephone, LLC. ( formerly  
Oneonta Telephone Company, Inc.)  
Peoples Telephone Company, Inc.  
Pine Belt Telephone Company, Inc.  
Ragland Telephone Company, Inc.  
Roanoke Telephone Company, Inc.  
Union Springs Telephone Company  
Valley Telephone Company